Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

MICHAEL G. BASINGER,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth Circuit Court of Appeals' opinion is in direct conflict with opinions of this Court, other circuit courts, and the Federal Rules of Civil Procedure?

TABLE OF CONTENTS –

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RULES INVOLVED 2

STATEMENT OF THE CASE 3

SUMMARY OF FACTS 3

REASON FOR GRANTING THE WRIT 7

THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IGNORED FEDERAL RULE OF CIVIL PROCEDURE 58 BY REFUSING TO CONSIDER ALL AFFIDAVITS WHICH WERE ON FILE PRIOR TO JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56(c) 7

CONCLUSION 11

APPENDIX

A – Order of the Sixth Circuit Court of Appeals, denying Petition for Rehearing en Banc, entered and filed August 27, 1996 ..... App. 1

B – Opinion of the Sixth Circuit Court of Appeals, decided and filed July 16, 1996 ..... App. 3

C – Order of the District Court for the Northern District of Ohio, denying Petitioner's Motion for Reconsideration ..... App. 17

TABLE OF CONTENTS – Continued

Page

D – Order of the District Court for the Northern District of Ohio, granting Respondent's Motion for Summary Judgment..... App. 20

E – Judgment Entry of Order of Northern District of Ohio, granting Respondent's Motion for Summary Judgment..... App. 24

TABLE OF AUTHORITIES

Page(s)

CASES

Atlantic Richfield Co. v. Monarch Leasing Co., 1996 WL 269065 (6th Cir. May 22, 1996) 9

Bowman v. Illinois Central R.R., 11 Ill. 2d 186, 142 N.E.2d 104, *cert. denied*, 355 U.S. 837 (1957) 8

Green v. River Terminal Ry., 763 F.2d 805 (6th Cir. 1985) 8

Sibbach v. Wilson & Co., 312 U.S. 1 (1941) 9, 10

Simon v. City of Clute, Texas, 825 F.2d 940 (5th Cir. 1987) 9

United States v. Indrelunas, 411 U.S. 216 (1973).....7, 9

United States v. Woods, 885 F.2d 352 (6th Cir. 1989) 9

RULES

Federal Rule of Civil Procedure 56(c) 2, 6, 7

Federal Rule of Civil Procedure 58.....2, 6, 7, 8, 9

Federal Rule of Civil Procedure 79(a) 2, 6, 7, 8

OPINIONS BELOW

The order of the Sixth Circuit Court of Appeals denying the Petition for Rehearing, with Suggestion for Rehearing *en banc*, is reprinted as Appendix A. The opinion and judgment of the United States Court of Appeals for the Sixth Circuit is reprinted as Appendix B. The opinion was not recommended for full-text publication pursuant to Sixth Circuit Rule 24. The opinion affirms the judgment of the United States District Court for the Northern District of Ohio. The District Court's Order denying Petitioner's Motion for Reconsideration is reprinted as Appendix C. The District Court's Order granting Respondent's Motion for Summary Judgment is reprinted as Appendix D and the Judgment Entry of that Order is reprinted as Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on July 16, 1996. The Sixth Circuit denied the Petition for Rehearing on August 27, 1996. This Petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on petition for *certiorari* is provided in Section 1254(c) of the Judicial Code (Title 28 U.S.C. § 1254(c)).

RULES INVOLVED

The relevant rules involved are Rule 56(c), 58, and 79(a) of the Federal Rules of Civil Procedure, which provide, in pertinent part:

Rule 56(c). Summary Judgment

> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

Rule 58. Entry of Judgment

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court. . . . Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). . . .

Rule 79. Books and Records Kept by the Clerk and Entries Therein

> (a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the

> Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. . . . All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. . . .

STATEMENT OF THE CASE

SUMMARY OF FACTS:

Petitioner Michael G. Basinger, a former employee of Respondent, working as a hostler helper and laborer in the diesel shop at Walbridge, Ohio since 1986, brought a Federal Employers' Liability Act ("FELA"), Title 45 U.S.C. § 51 *et seq.*, claim against Respondent for his carpal tunnel injuries, sustained over the period of his employment with Respondent. This claim was filed in the Northern District of Illinois on August 26, 1993 pursuant to that court's federal question jurisdiction. Subsequently, the parties stipulated to transfer the matter to the Northern District of Ohio, Western Division.

Over the course of his employment with Respondent, Petitioner was obligated to use malfunctioning equipment and equipment which was not adequately inspected, serviced, or maintained by Respondent. As a result of the continual stress and strain on Petitioner's hands and wrists from the faulty equipment, Petitioner developed a condition known as carpal tunnel syndrome.

In his Complaint, Petitioner specifically alleged negligence on Respondent's part in that it failed to provide Petitioner with a safe place to work, failed to warn Petitioner of the condition of the equipment, failed to supply Petitioner with functional equipment, and failed to inspect service, and maintain equipment.

Prior to taking Petitioner's deposition, Respondent filed a Motion for Summary Judgment on February 10, 1994 asserting that Petitioner's claims were unsupported by any evidence. Petitioner filed his Response to Respondent's Motion on March 15, 1994. In his Response, Petitioner presented the court with his own affidavit which detailed the types of equipment and activities which caused his injuries. Petitioner's affidavit also stated that he had heard fellow employees complaining about the condition of Respondent's equipment. In opposition to Respondent's Motion for Summary Judgment, Petitioner also attached the medical records of his treating physician, Dr. Elliot Saferin. These records indicated that Petitioner's injuries were work related. Furthermore, Petitioner's affidavit stated that he was informed by the physician that his carpal tunnel was work related.

No hearing on the Motion was ever scheduled or held. A written opinion dated June 14, 1994 granting

Respondent's Motion was sent to counsel. On June 23, 1994 the District Court's Judgment Order granting Respondent's Motion was entered on the civil docket. On June 22, 1994, prior to the entry of the court's Judgment Order, Petitioner filed a Motion for Reconsideration.

In support of this Motion, Petitioner submitted a second affidavit in order to clarify certain matters set forth in his initial affidavit. In his second affidavit, Petitioner specifically identified the switches which he claimed were not operating properly. He also stated that the complaints he heard were made by Respondent's employees to Respondent's supervisors and members of Respondent's Safety Committee. Furthermore, Petitioner testified that the spray guns he was required to use during the course of his employment were unsafe since there was no way to regulate the pressure at which they operated. Additionally, Petitioner submitted the affidavit of orthopaedic surgeon, Dr. John Dwyer. Dr. Dwyer attested that he had reviewed Dr. Saferin's medical records and based upon those and the types of hand and wrist stresses and strains Petitioner encountered in the workplace, it was his opinion that Petitioner's carpal tunnel was work related. On August 12, 1994 the court denied Petitioner's Motion. Petitioner filed a timely Notice of Appeal on August 24, 1994.

The Sixth Circuit affirmed the trial court's Orders granting summary judgment and denying the motion for reconsideration in an opinion filed July 16, 1996. The Court of Appeals held that Petitioner's Motion for Reconsideration was properly considered a Federal Rule of Civil Procedure 59(e) motion to alter or amend judgment. The court determined that the district court gave two (2)

rationales for denying Petitioner's Motion to Reconsider. First, that the additional evidence submitted by Petitioner should have been presented along with his initial response, and second, because the evidence submitted along with Petitioner's initial response did not meet the Federal Rule of Civil Procedure 56 requirements necessary to avoid summary judgment.

Because the court determined that Petitioner's Motion to Reconsider was a Rule 59(e) motion, the court held that the decision relating to the insufficiency of the evidence submitted with Petitioner's initial response was entitled to *de novo* review. However, the court held that the decision refusing to consider Petitioner's additional evidence was entitled to abuse of discretion review. The court based this decision on the conclusion that the evidence submitted along with Petitioner's Motion to Reconsider was untimely filed. The court further concluded that the district court did not abuse its discretion in refusing to consider Petitioner's additional evidence since it was untimely filed and was available at the time Petitioner was contesting Respondent's Motion for Summary Judgment.

The Court of Appeals' opinion did not address Petitioner's argument that, under Fed. R. Civ. P. 58 and 79(a), his additional evidence, i.e., Petitioner's second affidavit and the affidavit of Dr. Dwyer, were on file with the district court prior to the actual entry of judgment and prior to the time when the judgment of the district court became effective. Therefore, this evidence should have been considered by the district court and was entitled to *de novo* review by the Court of Appeals.

In *United States v. Indrelunas*, 411 U.S. 216 (1973), this Court held that a federal court judgment is rendered only when it is set forth in a separate document and entered on the civil docket, and that this requirement of a separate writing is to be mechanically observed. Therefore, the failure of the Sixth Circuit to address Petitioner's Rule 58 contention is in direct conflict with the decision of this Court in *Indrelunas* and other circuit court decisions.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IGNORED FEDERAL RULE OF CIVIL PROCEDURE 58 BY REFUSING TO CONSIDER ALL AFFIDAVITS WHICH WERE ON FILE PRIOR TO JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56(c)

This case presents an important issue concerning the interrelationship of Rules 56(c), 58, and 79(a). Petitioner is entitled to *de novo* review of all evidence on file prior to entry of judgment. The Sixth Circuit only reviewed the evidence on file at the time of the district court's written opinion and did not afford Petitioner a review of all evidence on file at the time judgment was entered. This issue becomes particularly significant when the district court decides the case without holding a hearing as contemplated by Rule 56(c).

The decision below should not be permitted to stand. The opinion of the district court, granting Respondent's Motion for Summary Judgment, failed to consider the additional evidence submitted by Petitioner, prior to the

entry of judgment. In affirming the district court's opinion, the Sixth Circuit held that the district court's decision not to consider this evidence was entitled to abuse of discretion review. However, because Petitioner's evidence was on file prior to the entry of judgment, all his evidence was entitled to *de novo* review.

The Sixth Circuit opinion did not address or mention a crucial contention in support of Plaintiff's argument; Plaintiff's clarification affidavit and the affidavit of Dr. Dwyer were *on file with the trial court prior to the actual entry of judgment*. The Court of Appeals' failure to recognize and consider this evidence in its decision unfairly deprived Petitioner of a proper *de novo* review of the grant of summary judgment against him.

Pursuant to Fed. R. Civ. P. 58, a judgment is effective only when entered as provided in Rule 79(a). The affidavits and exhibits submitted by Petitioner to the district court along with his Motion for Reconsideration were on file prior to judgment and, thus, entitled to *de novo* review by the Sixth Circuit along with Petitioner's initial affidavit.

Furthermore, the additional affidavits unquestionably created material issues of fact sufficient to defeat summary judgment. The effect of the Sixth Circuit's failure to recognize these affidavits is to deny an FELA plaintiff his right to a jury trial – a right which should be zealously and aggressively protected by this Court. *Green v. River Terminal Ry.*, 763 F.2d 805 (6th Cir. 1985); *Bowman v. Illinois Cent. R.R.*, 11 Ill. 2d 186, 142 N.E.2d 104, *cert. denied*, 355 U.S. 837 (1957).

The case law applicable to this issue is clear, convincing, and unanimously in support of Petitioner's position. For instance, the Sixth Circuit itself held that, "under federal procedural law, a federal court judgment is 'rendered' only when it is set forth in writing on a separate, discrete document and entered on the civil docket." *Atlantic Richfield Co. v. Monarch Leasing Co.*, 1996 WL 269065, *3 (6th Cir. May 22, 1996). The Sixth Circuit also determined that the requirement of a separate writing is to be mechanically observed. *Id.*, citing *United States v. Indrelunas*, 411 U.S. 216, 221-22 (1973). Furthermore, this Court stated that "a proper federal rule of procedure 'has the force of a federal statute' . . . " *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941).

In *United States v. Woods*, 885 F.2d 352 (6th Cir. 1989), the Sixth Circuit reversed and remanded a case, for which summary judgment had been granted, in part because the lower court had not complied with Rule 58. In that case, the lower court rendered its judgment in a marginal order, no separate document was entered. The court stated, "[i]t is, in sum, the command of the Federal Rules and of this court that the grant of summary judgment be set forth on a separate document." *Id.* at 353. Thus, regardless of the date upon which the trial court issued its written opinion, the Court of Appeals should have considered all evidence and affidavits on file *prior* to the date of judgment.

In *Simon v. City of Clute, Texas*, 825 F.2d 940 (5th Cir. 1987), the Fifth Circuit also held that Rule 58 expressly requires that every judgment be set forth on a separate document. *Id.* at 942. There, the court clarified that "[t]he term 'separate document' means a document separate

and apart from an opinion or memorandum of the court." *Id.* In that case, the court reversed the grant of summary judgment and remanded the case, concluding that summary judgment was granted before the plaintiffs were afforded the opportunity to develop all of their factual and legal support. *Id.* at 943.

In this case, Respondent's Motion for Summary Judgment was filed prior to the close of discovery. In fact, Petitioner had not even been deposed. In responding to the Motion, Petitioner was, therefore, forced to rely on affidavit testimony to support his position. While the district court refused to consider Petitioner's additional exhibits, thus, refusing to permit Petitioner to adequately develop his factual and legal support, the Court of Appeals' refusal to review this evidence *de novo* was in direct disregard of the Federal Rules of Civil Procedure, which have the force of a federal statute. *Sibbach*, 312 U.S. at 13.

Judgment was entered on June 23, 1994. Petitioner's opposing affidavits were on file on June 22, 1994, prior to the entry of judgment. Therefore, the Sixth Circuit should have examined the clarification affidavit of Petitioner Michael Basinger, the affidavit of Dr. John Dwyer, and the Safety Rules, *de novo*. The Court of Appeals should have considered such documents under summary judgment review.

CONCLUSION

Therefore, Petitioner respectfully requests that this Court grant *certiorari* to review the judgment below and reverse the decision of the district court and remand this cause for a full hearing on the merits. In the alternative, Petitioner respectfully requests that this Court vacate the opinion of the Sixth Circuit Court of Appeals and remand for a full *de novo* review of all the evidence submitted by Petitioner in support of his FELA claims.

Respectfully submitted,

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Dated: November 25, 1996

APPENDIX A

No. 94-3908

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL G. BASINGER, Plaintiff-Appellant, v. CSX TRANSPORTATION, INC., Defendant-Appellee.	)	ORDER (Filed Aug. 27, 1996)

BEFORE: NORRIS and MOORE, Circuit Judges; and MILES,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

---

*Hon. Wendell A. Miles, Senior United States District Judge for the Western District of Michigan, sitting by designation.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

NOT RECOMMENDED FOR PUBLICATION

No. 94-3908

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL G. BASINGER, **Plaintiff-Appellant,** v. CSX TRANSPORTATION, INC., **Defendant-Appellee.**	))))))))	**ON APPEAL** FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO **OPINION** (Filed Jul. 16, 1996)

BEFORE: NORRIS AND MOORE, Circuit Judges, and MILES, District Judge.*

KAREN NELSON MOORE, Circuit Judge. Plaintiff-Appellant Michael G. Basinger ("Basinger") appeals the district court's order granting summary judgment to Defendant-Appellee CSX Transportation, Inc. ("CSX"), and the district court's order denying Basinger's motion for reconsideration. Basinger argues that the district court erred by holding that Basinger had failed to produce evidence showing that there was a genuine issue of material fact in this case arising under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60. For the reasons that follow, we affirm the district court's orders granting summary judgment and denying the motion for reconsideration.

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*The Honorable Wendell A. Miles, United States District Judge for the Western District of Michigan, sitting by designation.

I

Basinger was employed by CSX, a railroad company, as a laborer and hostler helper. As part of his duties at CSX, Basinger had to "throw" hand-operated switches in the railroad yard. Basinger asserted that some of the switches were poorly maintained and not oiled, and thus were difficult to throw. Throwing these switches, according to Basinger, "regularly caused unnecessary stress and strain on my wrists." Basinger alleged that he overheard other employees complaining about the poorly maintained switches, but did not specify to whom the complaints were directed.

Another of Basinger's duties at CSX was to wash dirt and oil from train engines. To clean the engines, Basinger used a spray "gun" attached to a high pressure hose. According to Basinger, the spray gun would jerk his wrists when the water began to come through the hose, causing excessive strain on his wrists. Basinger stated that the spray gun was unsafe because there was no mechanism to regulate the amount of pressure from the hose, and there was no bracing or other means to hold the gun steady and avoid straining the employee's wrists.

In November 1990, Basinger noticed pain in his wrists, and was diagnosed with carpal tunnel syndrome in both wrists by Dr. Saferin. Basinger stated in his affidavit that Dr. Saferin told Basinger that the carpal tunnel syndrome was work-related, and that the poorly maintained switches and the spray gun were the types of stresses that could cause carpal tunnel syndrome. In 1992, Basinger had surgery on his wrists.

In 1993, Basinger filed a complaint under the FELA against CSX. Basinger, through his attorney, responded to CSX's discovery requests. Basinger produced some medical records relating to his carpal tunnel syndrome and gave essentially non-responsive answers to CSX's interrogatories. Based on these discovery responses, CSX moved for summary judgment. CSX based its motion on Basinger's failure to provide sufficient evidence of a prima facie FELA case, and attached to its motion both Basinger's discovery responses and an affidavit from a CSX employee stating that CSX had never received any complaints about the switches or the sprayer from Basinger.

In his response to CSX's summary judgment motion, Basinger attached only his affidavit, which recited the facts described above in the first three paragraphs of this section. Basinger did not attach an affidavit from Dr. Saferin or any other doctor discussing his carpal tunnel syndrome. The district court granted CSX's summary judgment motion, finding that Basinger's affidavit was insufficient under Rule 56(e) of the Federal Rules of Civil Procedure. The district court found that Basinger's affidavit did not go beyond the mere allegations of the complaint, and that Dr. Saferin's alleged statement to Basinger, as recounted in Basinger's affidavit, was inadmissible hearsay that could not be considered. The district court found CSX was entitled to summary judgment because Basinger failed to include evidence sufficient to raise a genuine issue of material fact about whether defects existed in the equipment, whether CSX had notice of the alleged defects, and whether the alleged defects caused Basinger's carpal tunnel syndrome.

Basinger then filed a motion for reconsideration of the district court's order granting CSX's motion for summary judgment. Basinger attached to his motion an affidavit from a Dr. Dwyer stating that throwing the poorly maintained switches caused Basinger's carpal tunnel syndrome and that the strain caused by the spray gun contributed to the carpal tunnel syndrome. Basinger also attached to his motion a "Clarification Affidavit of Michael G. Basinger," which contained additional information that the district court, in its opinion, had noted was not in Basinger's first affidavit. Basinger also attached to his motion a portion of the CSX safety handbook that discussed maintenance of the switches. Basinger did not argue that this information was previously unavailable to him, or offer any excuse for not attaching the information to his response to CSX's summary judgment motion.

The district court denied Basinger's motion for reconsideration. The district court reasoned that the evidence Basinger attached to his motion for reconsideration should have been presented in his response to CSX's summary judgment motion, and that the evidence Basinger had presented in his response to CSX's summary judgment motion was insufficient to avoid summary judgment. Basinger then appealed to this court.

II

Because the Federal Rules of Civil Procedure do not provide for a motion for reconsideration, such motions, if served within 10 days of the entry of judgment, are

considered motions to alter or amend judgments pursuant to Fed. R. Civ. P. 59(e). *Huff v. Metropolitan Life Insurance Co.*, 675 F.2d 119, 122 (6th Cir. 1982); *see also Foman v. Davis*, 371 U.S. 178, 181 (1962) (permissible to treat motion to vacate dismissal as a motion to alter or amend under Fed. R. Civ. P. 59(e)). Basinger's motion to reconsider was filed and served within 10 days of the district court's order granting summary judgment to CSX, and is properly considered a Rule 59(e) motion to alter or amend.

The district court gave two rationales for denying Basinger's motion to reconsider. First, the district court declined to consider the additional affidavits submitted by Basinger because "[t]he evidence that plaintiff now seeks to submit should have been presented in his opposition to the original motion." Second, the district court stated that it would deny the motion to reconsider because the evidence Basinger submitted in his response to CSX's summary judgment motion did not meet the Fed. R. Civ. P. 56 requirements necessary to avoid summary judgment.

A

This court generally reviews for an abuse of discretion a district court's order denying a motion for reconsideration. However, when the district court rejects a motion that seeks reconsideration of a grant of summary judgment, this court reviews the district court's legal determination de novo. *Columbia Gas Transmission Corp. v. Limited Corp.*, 951 F.2d 110, 112 (6th Cir. 1991). Although denials of Rule 59(e) motions that seek reconsideration of

grants of summary judgment generally are reviewed de novo, we will reserve de novo review only for the district court's second rationale in this case. We will review the district court's refusal to consider Basinger's additional evidence for an abuse of discretion.

In *Huff*, this court reviewed a denial of a motion to reconsider a grant of summary judgment under two different standards of review because the district court's denial of the motion to reconsider rested on two alternative grounds. The district court had reasoned first that the motion to reconsider should be denied because a federal court should not determine state law domestic relations issues. *Huff*, 675 F.2d at 122. This court held that this was error, because the domestic relations issues arose in the context of a federal statute that the district court was empowered to interpret. *Id.* at 122-23. The court stated in a footnote to this holding that:

> Although the appropriate standard of review is generally whether an abuse of discretion has occurred, when the lower court rejects an application under Rule 59(e) based upon an erroneous legal doctrine, our standard of review is the same as in other cases of legal error.

Id. at 122 n. 5.

The *Huff* court went to review under an abuse of discretion standard the district court's second ground for denying the motion to reconsider, which was that the evidence submitted in support of the 59(e) motion could not be considered because it was previously available, stating:

> . . . [W]e find no abuse of discretion in the district court's determination that the evidence would not be considered because it was not newly discovered and its credibility was doubtful.

Id. at 123. Thus, this court approved the use of multiple standards of review even when the order which was to be reconsidered was a grant of summary judgment.

The use of both standards of review also is consistent with the rationales behind each standard of review. Summary judgment is reviewed de novo because summary judgment is appropriate only when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. However, the district court's decision whether to consider untimely evidence is in the nature of a trial conduct issue, which generally is left to the district court's discretion. *See United States v. Poindexter,* 942 F.2d 354, 361 (6th Cir.) (district judge's conduct of a trial reviewed only for abuse of discretion), *cert. denied,* 502 U.S. 994 (1991). Therefore, we will review the district court's refusal to consider untimely evidence for abuse of discretion, and will review the district court's determination that Basinger's original evidence was insufficient de novo.

B

It is not an abuse of discretion for a district court to decline to consider a Rule 59(e) motion in which the movant attempts to submit evidence that was available at the time the movant was contesting a summary judgment motion. *Emmons v. McLaughlin,* 874 F.2d 351, 358 (6th Cir.

1989) ("It is well established, however, that a district court does not abuse its discretion in denying a Rule 59 motion when it is premised on evidence that the party had in his control prior to the original entry of judgment"); *Huff*, 675 F.2d at 122-23 (not an abuse of discretion for district court to decline to consider evidence submitted on motion to reconsider when evidence is not newly discovered and its credibility is doubtful). *See also Lostumbo v. Bethlehem Steel, Inc.*, 8 F.3d 569, 570 (7th Cir. 1993) (district court did not abuse its discretion by denying Rule 59(a) motion for finding of additional facts based on evidence party elected not to submit on summary judgment); *School District No. 1 J. Multnomah County v. AC and S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (not an abuse of discretion for district court to decline to consider previously available contract documents that were not submitted on summary judgment), *cert. denied*, 114 S.Ct. 2742 (1994); *Committee For The First Amendment v. Campbell*, 962 F.2d 1517, 1524 (10th Cir. 1992) (district court did not abuse its discretion in declining to consider previously available evidence submitted as attachment to motion to reconsider summary judgment).

In this case, the district court did not abuse its discretion by declining to consider the additional evidence submitted by Basinger. The additional evidence clearly was available to Basinger before he responded to CSX's summary judgment motion, and Basinger has given no explanation for his failure to submit the evidence earlier. Therefore, we will affirm the district court's order denying Basinger's motion to reconsider.

III

A

Basinger argues that the district court failed to consider the lower burden of proof placed on FELA plaintiffs is assessing the evidence presented by Basinger, and that Basinger's evidence met this lower burden of proof. This court reviews grants of summary judgment de novo, using the same test as the district court. *Wiley v. United States*, 20 F.3d 222, 224 (6th Cir. 1994). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* In all cases in which summary judgment is sought, "the nonmoving party cannot respond by merely resting on the pleadings, but rather the nonmoving party must present some 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). The nonmoving party must produce evidence sufficient to permit a reasonable jury to find for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."). " 'Speculation cannot supply the place of proof.' " *Green v. River Terminal Ry.*, 763 F.2d 805, 807 (6th Cir. 1985) (quoting *Moore v. Chesapeake & Ohio Ry.*, 340 U.S. 573, 576 (1951)).

Basinger is correct that the district court must view the evidence through the "prism of the substantive evidentiary burden" when deciding summary judgment motions, "bear[ing] in mind the actual quantum and

quality of proof necessary to support liability" under the substantive law. *Anderson*, 477 U.S. at 254. Basinger also is correct that FELA plaintiffs have a lower standard of proof than plaintiffs in ordinary negligence cases. *See Harbin v. Burlington Northern R.R.*, 921 F.2d 129, 131 (7th Cir. 1990) ("It is well established that the quantum of evidence required to establish liability in an FELA case is much less than in an ordinary negligence action."); *see also Rodriguez v. Delray Connecting R.R.*, 473 F.2d 819, 820 (6th Cir. 1973) (noting that commentators have stated that FELA verdicts may be sustained on evidence that would be insufficient in ordinary negligence actions). FELA plaintiffs must show only that the railroad's negligence played any part in causing the injury, instead of proving the ordinary negligence requirement that the negligence be the proximate cause of the injury. The Supreme Court has described the FELA plaintiff's burden as follows:

> Under this statute, the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.

Rogers v. Missouri Pacific R.R., 352 U.S. 500, 506 (1957). However, the FELA is not a workers' compensation statute, and plaintiffs must prove that their injuries resulted, at least in part, from the railroad's negligence. *Harris v. Illinois Central R.R.*, 58 F.3d 1140, 1143 (6th Cir. 1995). Therefore, an "FELA plaintiff is not impervious to summary judgment." *Lisek v. Norfolk & Western Ry.*, 30 F.3d 823, 832 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 904 (1995). Even when viewed through the prism of the FELA burden of proof, Basinger's evidence fails to show a genuine

dispute over any material fact, and the district court was correct to grant summary judgment to CSX.

B

To present a prima facie case under the FELA, a plaintiff must prove that:

> (1) the plaintiff was injured while in the scope of the plaintiff's employment;
>
> (2) the plaintiff's employment is in furtherance of the railroad's interstate transportation business;
>
> (3) the employer was negligent; and
>
> (4) the employer's negligence played some part in causing the injury for which compensation is sought under the FELA.

Green, 763 F.2d at 808. To prove that the employer was negligent, the FELA plaintiff must " 'prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation.' " *Adams v. CSX Transportation, Inc.*, 899 F.2d 536, 539 (6th Cir. 1990) (quoting *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987)). The district court held that Basinger presented insufficient evidence of the alleged defects, causation, and notice.

In his response to CSX's summary judgment motion, Basinger presented only his affidavit. Basinger presented no evidence that CSX had actual or constructive notice of the allegedly defective switches or spray gun. Basinger argues that his assertion in his affidavit that he "overheard fellow employees complain about these switches" is evidence that CSX had notice of the alleged defects.

However, even construed most favorably to Basinger, this assertion does not indicate that CSX had notice of the allegedly defective switches because Basinger does not state to whom the complaints were directed. Unless the complaints were directed to supervisory employees whose knowledge could be imputed to CSX, which is impossible to determine from Basinger's affidavit, CSX cannot be charged with knowledge of the alleged defects. Basinger also argues that the condition of the switches and spray gun provided constructive notice to CSX of the defects, but Basinger's affidavit provides no basis for this conclusion. The affidavit does not assert that the defects were visible or apparent to anyone who saw the switches or the spray gun. CSX presented evidence that it had not received any complaints from Basinger about the switches or the spray gun, and Basinger failed to come forward with any evidence to create an issue of fact on the notice issue. On this basis alone, the district court was correct to grant summary judgments to CSX, since FELA plaintiffs must prove that the railroad had actual or constructive notice, or that they could or should have known, of the allegedly defective workplace condition in order to state a claim. *Miller v. Cincinnati, New Orleans And Texas Pacific Ry.*, 317 F.2d 693, 695 (6th Cir. 1963) ("Under familiar law, defendant could not be convicted of negligence, absent proof that such defect was known, or should or could have been known, by defendant, with opportunity to correct it.").

C

Basinger also failed to present evidence that was sufficient to create a genuine issue of material fact on the

issue of causation. Assuming that the switches and spray gun were defective, Basinger provided no evidence, other than his own speculation, that the defects caused his carpal tunnel syndrome. Basinger argues that he provided evidence of causation in paragraph 14 of his affidavit, which reads:

> Dr. Saferin told me that the cause of the carpal tunnel was work related stress on my writs. Dr. Saferin told me the damage is done gradually over time. He also told me that the poorly maintained switches and the spray gun were the types of stresses with [sic] would cause this.

However, this statement in his affidavit cannot be considered as evidence on summary judgment because it is hearsay. *Wiley*, 20 F.3d at 226. While Fed. R. Civ. P. 56(e) does not require that a party present evidence in a form that would be admissible at trial, it does require that affidavits "set forth such facts as would be admissible in evidence." Thus, although evidence may be presented for summary judgment in the form of affidavits, which are not generally admissible at trial, inadmissible hearsay evidence contained in an affidavit cannot be considered on summary judgment. *See Treff v. Galetka*, 74 F.3d 191, 195 (10th Cir. 1996) (although the evidence need not be produced in a form that is admissible at trial, the content of the evidence must be admissible; "[i]nadmissible hearsay evidence in an affidavit will not defeat summary judgment").

Finally, Basinger argues that a statement in an occupational therapy evaluation record, which states "Cause of Injury – Work Related" is evidence of causation. However, this statement contains no indicia as to its source,

which could simply have been Basinger's or Dr. Saferin's speculation, and contains no indicia as to its author. Therefore, the statement is too slim a reed upon which to rest a genuine issue of material fact, even when the lower FELA burden of proof is considered. Basinger presented no competent evidence that the switches or the spray gun played even a slight role in causing his carpal tunnel syndrome. The district court was correct to grant summary judgment to CSX.

IV

The district court's orders granting summary judgment to CSX and denying Basinger's motion for reconsideration are **AFFIRMED.**

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Michael G. Basinger,

Plaintiff — 3:93CV7614

v. — Order

CSX Transportation, Inc.,

Defendant

Pending in this cause is a motion to reconsider an earlier decision in which I granted the defendant's motion for summary judgment. That decision was based on the plaintiff's failure to meet his burden under Rule 56 of the Federal Rules of Civil Procedure.

I decline to grant the motion for reconsideration. The evidence that plaintiff now seeks to submit should have been presented in his opposition to the original motion.

The requirements of Rule 56 are clear and straightforward. The principal purpose of summary judgment "is to isolate and dispose of factually unsupported claims and defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Federal Rule of Civil Procedure 56(e) places responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such a decision. Further, Rule 56(e) requires the non-moving party to go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, or admissions on file, designate specific facts

showing a genuine issue for trial. *Id.* at 324; *Cincinnati Newspaper Guild, Local 9 v. Cincinnati Enquirer, Inc.*, 863 F.2d 439, 441 (6th Cir. 1988). To oppose a motion for summary judgment successfully, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

To determine which facts are material, a court must look to the substantive law to be applied. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the dispute about a material fact is genuine, *i.e.*, if the evidence is such that a reasonable jury could return a verdict for the non-moving party, summary judgment should be denied. *Id.* "In deciding a motion for summary judgment a court may not resolve conflicts in the evidence or make credibility determinations; the evidence of the non-movant is to be taken as true and all justifiable inferences drawn in his or her favor." *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

Those requirements, which are not mere technicalities, were not met in plaintiff's opposition to the defendant's motion for summary judgment. Whether they can be met in light of subsequently submitted evidence is not material: they should have been, but were not met in plaintiff's original opposition to defendant's motion.

It is, accordingly,

ORDERED THAT plaintiff's motion for reconsideration be, and the same hereby is overruled.

So ordered.

/s/ James G. Carr
James G. Carr
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Michael G. Basinger,

Plaintiff

v.

CSX Transportation, Inc.,

Defendant

3:93cv7614

Judge James G. Carr

Order

This is an F.E.L.A. case in which the defendant has filed a motion for summary judgment. For the reasons that follow, I conclude that the motion is well taken and should be granted.

According to the complaint, plaintiff worked as a laborer at the defendant's Walbridge, Ohio, diesel shops. He claims to have developed carpal tunnel syndrome as a result of his work with paint sprayers and switches, which he claims were not in functional order.

In its motion for summary judgment the defendant contends that the plaintiff has failed to meet his burden of showing negligence on the defendant's part. A principal basis for this contention is the plaintiff's unresponsive and conclusory responses to several interrogatories. In a series of questions, the defendant sought to learn the underlying facts giving rise to plaintiff's claim. Instead of giving that information, the plaintiff simply responded, "See complaint; See your own investigation; Investigation continues. Plaintiff will supplement after his deposition" as to some questions and "Undetermined at this time.

Investigation continues" as to others (Doc. 24 at 8, 9, 12, 13).

The gravamen of defendant's motion for summary judgment is that, in light of plaintiff's responses to defendant's interrogatories, plaintiff has failed to show that there are any genuine disputes as to material facts. Defendant also asserts by way of affidavit that it has no record of any complaints by the plaintiff about the equipment he alleges caused his carpal tunnel syndrome (*Id.* Afft. of Kathy L. Shell).

In his opposition to defendant's motion, plaintiff simply submits his own affidavit. That affidavit asserts that some switches were poorly maintained and the paint sprayer caused excessive stress and strain on both wrists.

Plaintiff also asserts that his treating physician diagnosed carpal tunnel syndrome and told him that his condition was caused by "work related stress on my wrists" and "the poorly maintained switches and the spray gun were the types of stresses which would cause this" (Doc. 27, Exh. A. ¶ 14).

Plaintiff's affidavit is deficient in several respects: first, contrary to the requirements of Fed. R. Civ. P. 56(e), it does not go beyond the "mere allegations or denials of the [plaintiff's] pleading [i.e., complaint]" or "set forth specific facts showing that there is a genuine issue for trial." None of the allegedly malfunctioning switches is identified by reference to either plaintiff's own recollection, inspection or maintenance reports, complaints from other employees, or other sources of such data and information. Likewise there is no information about the make, etc., of the allegedly defective paint sprayers, whether

they were the subject of complaints or other, similar allegations from other employees or other users of those devices. The only "evidence" of any defect is plaintiff's own conclusory assertion.

The affidavit fails as well to conform to the requirement of Rule 56(e) in that there is no indication that some of its crucial assertions are "made on personal knowledge." There is no indication that Dr. Saferin has any basis for the conclusion attributed to him that the allegedly defective switches and paint sprayers could cause carpal tunnel syndrome. There is no indication that he has reviewed any reports relating to the particular equipment, is familiar with complaints regarding that or similar equipment, or has some other basis in his personal or professional experience for such conclusion. In a word, an expert opinion is attributed to him without any indication of the basis on which he could make such opinion.

In addition, the affidavit fails to comply with the requirement that it "set forth such facts as would be admissible in evidence." The opinion attributed to Dr. Saferin is inadmissible hearsay. As such, it cannot be considered as part of plaintiff's response to the motion for summary judgment, just as it could not be considered if offered in such fashion at trial.

Plaintiff's response, accordingly, fails to include evidence sufficient to raise a genuine issue about any defect in the equipment with which he worked, notice to the defendant about any such defect, or a causal connection between any such defect and his carpal tunnel syndrome. Because it fails to raise such genuine issue, defendant is entitled to summary judgment.

This may well be a harsh and unfair result: from what I know of carpal tunnel syndrome, it might well be caused by the kinds of conditions described by the plaintiff. But my sense of the plausibility of his allegations is no substitute for the evidence that the plaintiff is required to present under Rule 56(e) once his contentions have been tested by means of a summary judgment motion. Certainly I cannot overrule the defendant's motion simply on the basis that I have the inexpert impression that carpal tunnel syndrome results from stresses on the lower arms and wrists, and the possibility that such stresses might occur under the conditions described by plaintiff.

Instead, to overrule the motion I need to have a factual basis that shows that switches were defective and opinion evidence that such defects, and operation of paint sprayers of the type given to the plaintiff, could cause carpal tunnel syndrome. Plaintiff's affidavit fails to meet this need.

In adjudicating defendant's motion, I must take the record as I find it. Doing so, I find that plaintiff has failed to raise a genuine dispute of material fact, and, accordingly, it is

ORDERED THAT defendant's motion for summary judgment be, and the same hereby is granted.

The Clerk shall prepare an entry of judgment accordingly.

So ordered.

/s/ James G. Carr
James G. Carr
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

WESTERN DIVISION

Michael G. Basinger,

Plaintiff,

V.

CSX Transportation, Inc.,

Defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 3:93CV7614

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to ~~and or~~ hearing before the Court. The issues have been ~~and or~~ heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Defendant's motion for summary judgment is hereby granted. Case closed.

IT IS SO ORDERED.

/s/ James G. Carr
U.S. District Judge

Geri M. Smith
Clerk

June 23, 1994
Date

/s/ Cynthia L. Rundo
(By) Deputy Clerk

Supreme Court, U.S.
FILED
DEC 24 1996
CLERK

(2)

No. 96-861

In The

Supreme Court of the United States

October Term, 1996

MICHAEL G. BASINGER,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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19pp

CORPORATE AFFILIATION

Respondent, CSX Transportation, Inc., is a wholly-owned subsidiary of CSX Corporation.

Respondent, CSX Transportation, Inc., has the following nonwholly owned subsidiaries with shares outstanding in the hands of the public: Allegheny and Western Railway Company, The Baltimore and Cumberland Valley Rail Road Extension, The Central Railroad Company of South Carolina, The Cincinnati Inter-Terminal Railroad Company, The Cleveland Terminal & Valley Railroad Company, Dayton and Michigan Railroad Company, and The Home Avenue Railroad Company.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

RESPONDENT'S BRIEF IN OPPOSITION..... 1

STATEMENT OF JURISDICTION..... 1

RULES INVOLVED 1

STATEMENT OF THE CASE..... 3

I. Course of Proceedings and Disposition of the Case Below 3

II. Correction of Misstatements in the Petition .. 7

REASONS FOR DENYING THE WRIT 7

I. The Sixth Circuit Court of Appeals' Decision and Opinion is Not in Conflict with this Court's Opinion in *United States v. Indrelunas*, 411 U.S. 216 (1973) and Other Federal Court Opinions 8

II. The Sixth Circuit Court of Appeals' Decision, Affirming the District Court's Ruling, Follows Well-Settled Principles and Furthers the Purpose Underlying Rule 56 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES CITED:

Atlantic Richfield Co. v. Monarch Leasing Co., 84 F.3d 204 (6th Cir. 1996) 9, 10

Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 43 F.3d 1054 (6th Cir. 1995), *cert. denied*, 116 S.Ct. 296 (1995) 13

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) 11, 13

Moore, Owen, Thomas & Co. v. Coffey, 992 F.2d 1439 (6th Cir. 1993) 13

United States v. Indrelunas, 411 U.S. 216 (1973) 8, 9

United States v. Woods, 885 F.2d 352 (6th Cir. 1989) 10

RULES CITED:

Federal Rule of Civil Procedure 6(b) 2

Federal Rule of Civil Procedure 56 ..... 3, 8, 9

Federal Rule of Civil Procedure 56(c) 3, 8, 11

Federal Rule of Civil Procedure 56(e) 5

Federal Rule of Civil Procedure 58 ..... 3, 8, 9, 10

Federal Rule of Civil Procedure 59(e) 6

Federal Rule of Civil Procedure 79(a) 3, 8

Local Rule 8:8.1 of the United States District Court for the Northern District of Ohio 3, 12

Supreme Court Rule 10 7

Supreme Court Rule 15.1 7

TABLE OF AUTHORITIES – Continued

Page(s)

STATUTE CITED:

28 U.S.C. § 1254(1) 1

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, CSX Transportation, Inc., respectfully requests that the Court deny the Petition for Writ of Certiorari ("the petition") submitted by Petitioner, Michael G. Basinger, seeking review of the decision dated July 16, 1996, of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF JURISDICTION

Petitioner asserts that the jurisdiction of this Court to review the judgment on petition for certiorari is provided in Section 1254(c) of the Judicial Code (Title 28 U.S.C. § 1254(c)). However, no subsection (c) exists to Title 28 U.S.C. § 1254. Respondent will assume, for purposes of jurisdiction, that petitioner meant to assert that jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit on petition for certiorari is proper pursuant to Section 1254(1) of the Judicial Code (Title 28 U.S.C. § 1254(1)).

RULES INVOLVED

In addition to the rules cited by Petitioner, the following rules are also relevant:

Rule 6. Time

> **(b) Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause

shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect;. . . .

Fed. R. Civ. P. 6(b).

Rule 8:8.1 Motions – General Information

(b) Motions to be in Writing. All motions, unless made during a hearing or trial, shall be in writing and shall be made sufficiently in advance of the trial to avoid any delay in trial.

(c) Memorandum by Moving Party. The moving party shall serve and file with its motion a memorandum of the points and authorities on which it relies in support of the motion.

(d) Memorandum in Opposition. Each party opposing a motion shall serve and file a memorandum in opposition within ten (10) days after service of the motion, excluding intermediate Saturdays, Sundays, and legal holidays.

(e) Reply Memorandum. The moving party may serve and file a reply memorandum in support of its motion within five (5) days after service of the memorandum in opposition, excluding intermediate Saturdays, Sundays, and legal holidays.

. . . .

> **(g) Hearings.** The Judicial Officer may rule on unopposed motions without hearing at any time after the time for filing an opposition has expired. The Judicial Officer may also rule on any opposed motion without hearing at any time after the time for filing a reply memorandum has elapsed.
>
> . . . .

Local Rule 8:8.1 of the United States District Court for the Northern District of Ohio.

STATEMENT OF THE CASE

Respondent respectfully opposes the petition for writ of certiorari, by which petitioner aspires to "force a square peg into a round hole." The petition is an attempt to fabricate an issue concerning the interrelationship of Rules 56(c), 58 and 79(a) of the Federal Rules of Civil Procedure. However, petitioner overlooks other pertinent Federal Civil Rules, and misconstrues, or altogether fails to understand, the purposes underlying Rules 56 and 58.

I. Course of Proceedings and Disposition of the Case Below

Petitioner, on August 26, 1993, filed a Complaint in the United States District Court for the Northern District of Illinois, seeking damages under the Federal Employers' Liability Act ("FELA"), for carpal tunnel syndrome which he alleges occurred as a result of various negligent acts purportedly committed by respondent, his employer, during his employment. Both petitioner and

respondent then stipulated to transfer of the case to the United States District Court for the Northern District of Ohio, sitting at Toledo, Ohio.

Respondent served its interrogatories and requests for production of documents upon petitioner on December 8, 1993, and petitioner served his answers to these interrogatories on January 21, 1994. Petitioner's answers to respondent's interrogatories revealed that petitioner could not establish any element necessary to present a *prima facie* FELA action.

Accordingly, respondent moved for summary judgment on February 10, 1994, on the basis that petitioner's answers to respondent's interrogatories demonstrated that petitioner could not establish evidence that respondent was negligent or that any action on the part of respondent resulted in petitioner's injuries. Petitioner moved the Court for an extension of time to file a response to respondent's Motion for Summary Judgment, stating that petitioner needed additional time to provide the supporting affidavits and materials. The Court granted petitioner's motion and petitioner was given until March 15, 1994, to file his response. Petitioner responded to the motion for summary judgment on March 15, 1994.

The only evidence accompanying the response was an affidavit of the petitioner. This affidavit, even when viewed in a light most favorable to petitioner, contained no evidence of negligence on the part of respondent, or of a nexus between respondent's alleged negligence and

petitioner's carpal tunnel syndrome. Accordingly, petitioner failed to meet his evidentiary burden to demonstrate a genuine issue of material fact in order to preclude the grant of summary judgment in favor of respondent. Respondent then filed a Reply Memorandum on or about March 28, 1994, pointing to petitioner's failure in this regard.

On June 14, 1994, almost three (3) months after petitioner filed his response and respondent had filed its Reply Memorandum, the District Court granted respondent's Motion For Summary Judgment. The District Court acknowledged that the petitioner's affidavit submitted in response to respondent's Motion for Summary Judgment was deficient in several respects. First, it did not go beyond the mere allegations of the petitioner's pleading or set forth specific facts showing that there was a genuine issue for trial. (Appendix D to the Petition). Second, the District Court determined that the affidavit failed to meet the requirements of Federal Rule of Civil Procedure 56(e) in that there was no indication that the crucial assertions were based upon personal knowledge. (Appendix D to the Petition). Finally, the District Court noted that the affidavit failed to comply with the requirement that: "It set forth such facts as would be admissible in evidence." (Appendix D to the Petition). Based upon the above, the District Court ruled that petitioner's response failed to include evidence sufficient to raise a genuine issue of material fact, and summary judgment was properly granted to respondent.

Petitioner, on June 22, 1994, filed a motion for reconsideration of the summary judgment order. An affidavit of Dr. John J. Dwyer, a second affidavit of petitioner and

an excerpt from CSX's Safety Handbook were attached to that motion. On August 12, 1994, the District Court denied petitioner's motion for reconsideration, stating that the evidence petitioner sought "to submit should have been presented in his opposition to the original motion" for summary judgment. (Appendix C to the Petition).

Petitioner appealed the District Court's grant of summary judgment and denial of the motion for reconsideration to the United States Sixth Circuit Court of Appeals. The Sixth Circuit Court of Appeals affirmed both of the District Court's orders. (Appendix B to the Petition). The Court of Appeals considered petitioner's motion for reconsideration as a motion to alter or amend under Rule 59(e) of the Federal Rules of Civil Procedure, and reviewed the District Court's refusal to consider petitioner's additional evidence under an abuse of discretion standard. (Appendix B to the Petition). In addition, the Court of Appeals reviewed *de novo* the District Court's determination that petitioner's original evidence was insufficient to establish a genuine issue of material fact. (Appendix B to the Petition).

The Court of Appeals ruled on July 16, 1996, that the District Court did not abuse its discretion when it denied the motion for reconsideration which sought to submit additional evidence that had been available at the time the petitioner originally contested the summary judgment motion. (Appendix B to the Petition). Moreover, the Court of Appeals found that the District Court was correct to grant summary judgment to respondent in light of the evidence properly before it. (Appendix B to the Petition).

Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc on or about July 29, 1996. On

August 27, 1996, the Petition was denied by the United States Court of Appeals for the Sixth Circuit. (Appendix A to the Petition).

II. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.1, respondent brings the following misstatements of facts contained in the petition to the Court's attention.

Petitioner misrepresents to the Court the nature of the equipment and the cause of his alleged carpal tunnel syndrome. (Petition at 4). Petitioner never established that any of the equipment he utilized during the course of his employment was malfunctioning or improperly inspected, serviced, or maintained. Moreover, petitioner failed to bring forth evidence that he developed carpal tunnel syndrome as a result of his use of this equipment. It is surprising that petitioner, after having been alerted by two (2) courts that he has not established evidence of his claim, would again attempt to present as facts mere allegations unsupported by any evidence.

Moreover, petitioner represents to the Court that he is a former employee of respondent. (Petition at 3). However, petitioner remains actively employed by respondent.

REASONS FOR DENYING THE WRIT

Petitioner has identified, pursuant to Rule 10 of the Supreme Court Rules, no compelling reason to grant his petition for writ of certiorari. Contrary to the representations made in the petition, the decision of the Sixth Circuit Court of Appeals is not in direct conflict with the

decision of this Court in *United States v. Indrelunas*, 411 U.S. 216 (1973). Petitioner's interpretation of the interrelationship between Rules 56(c), 58 and 79(a) completely ignores the purposes underlying these rules. In fact, the Sixth Circuit Court of Appeals' decision is consistent with the purposes underlying Rules 56 and 58 of the Federal Rules of Civil Procedure as expressed by this Court. Accordingly, there is no important issue concerning the interrelationship of Rules 56(c), 58, and 79(a) awaiting determination, and the petition for writ of certiorari should be denied. The District Court and the Sixth Circuit Court of Appeals correctly applied existing, well-established precedent to the facts of this case. Petitioner's assertion that there is an issue to be heard is a last, desperate attempt to seek review of a proper and well-reasoned decision of the District Court, albeit one unfavorable to petitioner.

I. The Sixth Circuit Court of Appeals' Decision and Opinion is Not in Conflict with this Court's Opinion in *United States v. Indrelunas*, 411 U.S. 216 (1973) and Other Federal Court Opinions.

Petitioner argues that he is entitled to *de novo* review of all evidence on file in the district court prior to entry of judgment. (Petition at 7). He argues that Rule 58 requires such *de novo* review. Petitioner argues further that the failure of the Sixth Circuit Court of Appeals to address Petitioner's Rule 58 contention is in conflict with the decision of this Court in *United States v. Indrelunas*, 411 U.S. 216 (1973). (Petition at 7). Petitioner's interpretation of Rule 58 and arguments are patently wrong because the issue facing the Court in *Indrelunas* was entirely different from the "issue" petitioner now attempts to create in the

instant case. Petitioner ignores the purpose underlying Rule 58 of the Federal Rules of Civil Procedure and fails to recognize that there simply is no issue remaining in this case.

The question facing the Court in *United States v. Indrelunas*, 411 U.S. 216 (1973), was whether the United States Court of Appeals for the Seventh Circuit had erred in dismissing an appeal on the basis that the appeal was untimely filed under the provisions of Rule 4 of the Federal Rules of Appellate Procedure. The *Indrelunas* case had nothing to do with Rule 56 of the Federal Rules of Civil Procedure, motions for summary judgment, the filing of untimely affidavits, or motions for reconsideration. In fact, the *Indrelunas* case involved an appeal after a jury verdict had been entered in favor of certain taxpayers. *See id.* at p. 218. Accordingly, petitioner's reliance on this opinion is misplaced.

Indeed, the only relevance the *Indrelunas* opinion has to this case is its discussion of the purpose underlying Rule 58. The *Indrelunas* opinion makes it clear that the sole purpose of the separate-document requirement added to Rule 58 was to clarify when the time for appeal begins to run. *Id.* at 220-221. No possible reading of the *Indrelunas* opinion mandates that a Court of Appeals panel is required to consider affidavits *de novo* which were untimely filed by petitioner after summary judgment was already granted against him.

The other caselaw cited by petitioner also does not support his position. For example, petitioner cites *Atlantic Richfield Co. v. Monarch Leasing Co.*, 84 F.3d 204 (6th Cir. 1996), as a case that supports his argument that the Court

of Appeals was required by Rule 58 to review *de novo* the untimely affidavits he filed after the District Court had considered the evidence properly before it and granted summary judgment to respondent. No reading of the *Atlantic Richfield* opinion could lead to the conclusion that Rule 58 required the Court of Appeals to consider petitioner's untimely affidavits. In *Atlantic Richfield*, the Court of Appeals for the Sixth Circuit was faced with the issue of whether the plaintiff had timely filed its complaint to extend the life of the original judgment it had won. *See id.* at 207.

The opinion of the Sixth Circuit Court of Appeals in *United States v. Woods*, 885 F.2d 352 (6th Cir. 1989), also does not support petitioner's position. One of the questions before the Court in the *Woods* case was whether a district court's failure to follow the dictates of Rule 58 of the Federal Rules of Civil Procedure required a reversal of the grant of summary judgment to the plaintiff. In *Woods*, the district court had failed to set forth the judgment in a separate document, and had instead entered a marginal order upon the plaintiff's motion for summary judgment. *Id.* at 353. The Court held that the grant of summary judgment in favor of the plaintiff had to be reversed in light of the fact that no reason at all had been set out for the grant of summary judgment in favor of the plaintiff and Rule 58 clearly had been violated because no separate judgment had been entered. *Id.* at 354. No such violation of Rule 58 occurred in the present case.

Respondent does not dispute that Rule 58 of the Federal Rules of Civil Procedure requires that every judgment be set forth on a separate document. Respondent does, however, dispute that this civil rule gives rise to an

issue for appeal in the instant case. No case cited by petitioner in the petition requires *de novo* review by a Court of Appeals of untimely affidavits opposing a motion for summary judgment filed after the Court has already considered the evidence properly before it and granted summary judgment to respondent.

II. The Sixth Circuit Court of Appeals' Decision, Affirming the District Court's Ruling, Follows Well-Settled Principles and Furthers the Purpose Underlying Rule 56.

Both the opinion of the Sixth Circuit Court of Appeals and the opinion of the District Court are consistent with established caselaw. This Court, in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), determined that a Court of Appeals could not rely upon supplemental affidavits which were submitted by a party after that party had already filed its opposition to a Motion for Summary Judgment. This Court held that the district court did not abuse its discretion in declining to admit the affidavits:

> Respondent's evidentiary submission was indeed untimely, both under Rule 56, which requires affidavits in opposition to a summary judgment motion to be served "prior to the day of the hearing," Fed. R. Civ. Proc. 56(c), and under Rule 6(d), which states more generally that "[w]hen a motion is supported by affidavit, . . . opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time." Rule 6(b) sets out the proper approach in the case of late filings:

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect. . . . "

Id. at 895.

Local Rule 8:8.1(g) of the United States District Court for the Northern District of Ohio, containing information relating to motions, provides the following:

> (g) *Hearings.* The Judicial Officer may rule on unopposed motions without hearing at any time after the time for filing an opposition has expired. The Judicial Officer may also rule on any opposed motion without hearing at any time after the time for filing a reply memorandum has elapsed.

Petitioner was put on notice by this local rule that at any time after respondent filed its Reply Memorandum, respondent's Motion for Summary Judgment could be ruled upon by the Court. Accordingly, the time for filing affidavits opposing the motion for summary judgment was prior to the time for filing a reply memorandum had lapsed, not after summary judgment had been granted in favor of respondent.

The law in the Sixth Circuit is consistent with this Court's determination that, in the context of a summary

judgment motion, the district court has the discretion to refuse the filing of untimely affidavits. *See, e.g., Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 F.3d 1054, 1065 (6th Cir. 1995), *cert. denied*, 116 S.Ct. 296 (1995); *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1446 (6th Cir. 1993). This Court had made it clear that, "[T]he purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990). When respondent filed its original motion for summary judgment, petitioner was required to oppose that motion with a sworn averment. Petitioner failed to provide such sworn testimony in a timely fashion, and cannot now be permitted to misconstrue the Federal Rules of Civil Procedure in order to circumvent his own dilatory tactics.

CONCLUSION

There being no conflict between opinions of this Court, the Federal Rules of Civil Procedure, and the Sixth Circuit Court of Appeals' opinion in this case, the writ of certiorari should be denied.

Respectfully submitted,

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